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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re P.K.,

a Person Coming Under the Juvenile  
Court Law.

B207365

(Los Angeles County  
Super. Ct. No. CK67592)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

Plaintiff and Respondent,

v.

NICOLE P.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Sherri Sobel, Juvenile Court Referee. Affirmed.

Marissa Coffey, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Tracey M. Blount, Deputy County Counsel, for Plaintiff and Respondent.

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## **INTRODUCTION**

Appellant Nicole P. (Mother) appeals from an order terminating her parental rights over her daughter, P.K., pursuant to Welfare and Institutions Code section 366.26.<sup>1</sup> She claims the trial court erred in failing to find the parental relationship exception (§ 366.26, subd. (c)(1)(B)(i)) applied. We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

In early 2007, when P.K. was about 16 months old, she and two of Mother's other children came to the attention of the Department of Children and Family Services (DCFS).<sup>2</sup> A DCFS social worker met Mother at the apartment where she lived with the three children. The social worker observed P.K. in a playpen, putting small objects in her mouth and wearing a urine-soaked diaper and clothing. The floor of the apartment, including the kitchen, was littered with garbage. In the kitchen, there were dirty dishes and little food.

Mother voluntarily attended a Team Decision-Making meeting with DCFS staff. When she reported using drugs, the staff provided her with bus tokens and drug testing referrals. Mother made excuses for not going for drug testing and finally said DCFS could not make her do so. P.K. needed her one-year immunizations, and the public health nurse made an appointment for Mother to take P.K. for her immunizations. Mother did not keep the appointment and refused to reschedule. Ultimately, on March 27, 2007, Mother refused to cooperate further with DCFS. Later in the day, when police officers went to Mother's apartment to take P.K. into protective custody, P.K. was

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code.

<sup>2</sup> Each child had a different father. Neither the other two children nor any of the fathers is involved in this appeal.

in the playpen, again wearing a urine-soaked diaper and clothing. P.K. was detained in foster care on March 28.

On April 2, 2007, DCFS filed a section 300 petition based upon Mother's history of substance abuse, including methamphetamines, and the resulting impairment of her ability to provide care for her children; Mother's inappropriate plan for them in leaving them in the care of their maternal grandmother and her male companion, who engaged in domestic violence in the presence of one of P.K.'s siblings; and Mother's history of domestic violence with the fathers of P.K.'s siblings.

A jurisdiction/disposition hearing was held on April 23, 2007. The social worker reported that Mother failed to attend her scheduled pre-hearing interview. The juvenile court sustained the amended section 300 petition. The court ordered reunification services for Mother, with monitored visits at least twice a week. The court ordered Mother to participate in individual counseling and in programs for drug rehabilitation with random drug testing, domestic violence and parenting.

An interim review hearing was held on July 23, 2007. The social worker's report prepared for the hearing indicated that, although the social worker had made three appointments with Mother subsequent to the jurisdiction/disposition hearing, Mother did not appear for the appointments. Mother failed to reply to the social worker's telephone messages many times, and when she did call back, she asked only about one of P.K.'s siblings. As of July 18, Mother had failed to comply with the court-ordered participation in counseling and programs for drug rehabilitation, domestic violence and parenting, and Mother had failed to visit P.K.

The court held a section 366.21, subdivision (e), hearing on October 22, 2007. The social worker recommended termination of Mother's reunification services based on her failure to comply with the court's order during the six-month reunification period. The social worker's report indicated that, although Mother had requested referrals to comply with the court's order, she had not attended any programs or counseling sessions and had missed a recent random drug test. Mother did not begin visiting P.K. until September 7 and had only visited four times as of October 12. The foster family

agency's social worker reported that the visits were going "relatively well," although there were concerns, such as Mother being critical of P.K. and calling her a "brat." P.K.'s caretaker reported that P.K. regressed after visits with Mother, waking several times a night and being cranky in the morning.

On November 15, 2007, the court held a progress hearing. The social worker reported that Mother enrolled in an in-patient drug rehabilitation program, which also met the court-ordered requirements for counseling, and a parenting program, and a counselor would facilitate Mother's random drug testing. Subsequently, the drug rehabilitation program reported that Mother was attending counseling and programs for drug rehabilitation, domestic violence and parenting on a weekly basis.

The social worker also reported, however, receiving information that Mother was in a relationship with a known gang member and was pregnant with his child. The social worker recommended again that Mother's reunification services be terminated, in that she failed to comply with the court's order within the six-month reunification period, and there were concerns about Mother's relationship with the gang member.

At Mother's request, a contested section 366.21, subdivision (e), hearing was held on November 29, 2007. The social worker reported that Mother had called to say that the rehabilitation program was not for her, people in the program were drug addicts and she only did drugs a few times, but if she left the program, she was afraid that DCFS would take her baby away.

The social worker testified that Mother did not enroll in the drug rehabilitation program until late October, had not complied with the random drug testing ordered, and was not participating in individual counseling as ordered. Mother testified she had not enrolled in some programs because she could not afford them and had difficulty until she got a referral for the in-patient drug rehabilitation program. Mother admitted she did not communicate with the social worker at first, but she understood what the court order required her to do and tried to be in substantial compliance.

The social worker's report for the hearing indicated that P.K.'s caretaker reported that P.K. had terrible temper tantrums and she was inconsolable after visits with Mother.

Since beginning visits with Mother, P.K. had been extremely clingy, would cry and scream until the caretaker picked her up, and would wake at night and cry until the caretaker held her.

The juvenile court found that Mother was not in substantial compliance and that the court would not be able to return P.K. to Mother's care within the next six months. The court found that Mother continued to claim she did not have a drug problem, rather than acknowledge it, Mother did not understand why she was before the juvenile court and she claimed there were no domestic violence issues, all despite the evidence of her drug problem, her history with her other children in juvenile court proceedings, and her record with regard to domestic violence issues. The court also mentioned that Mother knew what she needed to do to comply with the court's order when she signed the case plan but did nothing until a month before the contested section 366.21, subdivision (e), hearing. The court ordered that Mother's reunification services be terminated and set a section 366.26 hearing.

In a report prepared for the March 27, 2008 section 366.26 hearing, the social worker informed the court that Mother continued to have weekly two-hour visits with P.K. The visits occasionally were cancelled if Mother failed to confirm her visit. The social worker recommended termination of parental rights.

At Mother's request, the juvenile court held a contested section 366.26 hearing on April 22, 2008. The social worker's report prepared for the hearing detailed Mother's continuing lack of compliance with court-ordered programs. Bessy Herrera (Herrera), Mother's case manager at the drug rehabilitation program, told the social worker that Mother's attendance was bad, her attitude was negative when she was present, and Mother told Herrera that when the court-ordered programs were finished, Mother would go back to doing the things she did before the programs. Herrera reported an incident of Mother's suspected drug use and that Mother tested positive for marijuana at her most recent drug test.

The report also indicated that Mother's individual counselor informed the social worker that she met with Mother in January 2008, but Mother never returned for therapy

or answered any of the counselor's numerous telephone messages. The counselor also reported that Mother met with a psychiatrist, but only one time.

Mother testified that she visited P.K. every Friday. She and P.K. did coloring, puzzles, or played in the pretend kitchen. Mother said that P.K. would hug her, hold on to her, was happy when Mother arrived, and sometimes wanted to stay with her at the end of the visit. Mother testified that terminating her parental rights was not in P.K.'s best interests, as shown by P.K.'s running to Mother, expressing love to Mother and crying when Mother had to leave.

The juvenile court found by clear and convincing evidence that P.K. was adoptable and ordered Mother's parental rights to be terminated. The court acknowledged that Mother had taken care of P.K. for 16 months after birth, but it also noted Mother's strongly resistant attitude to dealing with her drug use, domestic violence and parenting issues. The court stated that "even though the child's happy to see the . . . mother," the mother's relationship with P.K. "can't begin to outweigh the need for permanency that a[n adoptive] family would give her." The court found that Mother had not proven herself able to parent any child and was not prepared to be anything but a visitor in P.K.'s life. Mother's contact with P.K. had been in monitored visits, and Mother had not filed a request pursuant to section 388 for the court to change its order regarding visitation.

## **DISCUSSION**

Mother contends that the juvenile court erred in terminating her parental rights, in that the court failed to find that Mother satisfied the "benefit from continuing the [parental] relationship" exception (§ 366.26, subd. (c)(1)(B)(i)<sup>3</sup>) and the judgment terminating her parental rights is not supported by substantial evidence. We disagree.

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<sup>3</sup> Section 366.26, subdivision (c)(1), provides: "If the court determines, based on . . . relevant evidence, by a clear and convincing standard, that it is likely the child

Section 366.26, subdivision (c)(1), provides that, if a juvenile court finds that it is likely a child will be adopted, the court must terminate parental rights and order the child placed for adoption unless one of the specified exceptions applies. The legislative intent expressed in section 366.26, subdivision (c), is that “adoption should be ordered unless exceptional circumstances exist, [and pursuant to subdivision (c)(1)(B)(i),] one of those exceptional circumstances [is] the existence of such a strong and beneficial parent-child relationship that terminating parental rights would be detrimental to the child and outweighs the child’s need for a stable and permanent home that would come with adoption.” (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51.)

Noting that section 366.26 does not define the type of parent-child relationship which would trigger the application of the exception, the court in *In re Brandon C.* (1999) 71 Cal.App.4th 1530 stated that “[c]ourts have required more than just ‘frequent and loving contact’ to establish the requisite benefit for this exception.” (*Id.* at p. 1534.) “In the context of the dependency scheme prescribed by the Legislature, we interpret the ‘benefit from continuing the [parent/child] relationship’ exception to mean the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship . . . against the security and the sense of belonging a new family would confer. . . . [¶] Interaction between natural parent and child will always confer some incidental benefit to the child. The significant attachment from child to parent results from the adult’s attention to the child’s needs for physical care, nourishment, comfort, affection and stimulation. [Citation.] . . . The exception applies only where the court

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will be adopted, the court shall terminate parental rights and order the child placed for adoption. . . . Under these circumstances, the court shall terminate parental rights unless either of the following applies: [¶] . . . [¶] (B) The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.”

finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575; accord, *In re Casey D.*, *supra*, 70 Cal.App.4th at p. 51.) The relationship required is “a continuing parental relationship; not one . . . when a parent has frequent contact with but does not stand in a parental role to the child.” (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1420.)

Mother claims that the evidence showed that she had a strong emotional bond with P.K., in that Mother cared for P.K. for the first 16 months of P.K.’s life, Mother had visited regularly once she began cooperating with the visitation program, and P.K. responded positively and lovingly to Mother during the visits and cried when Mother left. She points out that, during some visits, she changed P.K.’s diaper and fixed P.K.’s hair.

The evidence also showed, however, that P.K. had lived with the caretaker since P.K. was 16 months old. The caretaker had taken on the role of P.K.’s “mommy,” as P.K. referred to her. The caretaker provided for P.K.’s basic needs, such as feeding, diapering, bathing and clothing, on a daily basis. The caretaker sought to meet P.K.’s emotional needs through consoling, holding and playing with P.K.

We acknowledge that there is a split of authority regarding whether the substantial evidence or the abuse of discretion standard of review applies in an appeal of termination of parental rights under section 366.26, subdivision (c)(1). The substantial evidence standard was applied in *In re Autumn H.*, *supra*, 27 Cal.App.4th at page 576. Under this standard, if substantial evidence, considered “in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order,” supports the juvenile court’s order, we must affirm the order. (*Ibid.*)

The abuse of discretion standard was applied in *In re Jasmine D.* (2000) 78 Cal.App.4th 1339. The *Jasmine D.* court reasoned that a termination of parental rights determination was analogous to a custody determination, and the Supreme Court had opined that the abuse of discretion standard applies to custody determinations. (*Id.* at p. 1351, citing *In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) As the *Jasmine D.* court



stated, however, “[t]he practical differences between the two standards of review are not significant. ‘[E]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling. . . . Broad deference must be shown to the trial judge. The reviewing court should interfere only “‘if [it] find[s] that under all the evidence, viewed most favorably in support of the trial court’s action, no judge could reasonably have made the order that he did.’ . . .” [Citations.]’” (*In re Jasmine D.*, *supra*, at p. 1351.) As our analysis below will show, the juvenile court’s order must be affirmed, regardless of which standard of review applies.

The stated legislative purpose of the provision for termination of parental rights in section 366.26 is “to provide stable, permanent homes” for all children who are dependents of the juvenile court. (*Id.*, subd. (b).) In the legislatively-mandated order of preference of dispositions, the first is to terminate parental rights and order that the child be placed for adoption. (*Id.*, subd. (b)(1).)

Mother does not challenge the juvenile court’s finding that, by clear and convincing evidence, it is likely P.K. will be adopted. If a juvenile court makes such a finding, and in the absence of any of the statutorily specified exceptions, “the court *shall* terminate parental rights.” (§ 366.26, subd. (c)(1), italics added.)

The evidence showed that although Mother had cared for P.K. for the first 16 months of her life, Mother’s contact with P.K. thereafter did not extend beyond Mother being a welcome visitor in P.K.’s life. It was P.K.’s caretaker who occupied the place of a parent in P.K.’s day-to-day life, whom P.K. now viewed as her “mommy.”

The evidence Mother presented as to her relationship with P.K. did not establish that this relationship “promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.” (*In re Autumn H.* (1994) 27 Cal.App.4th at p. 575.) Neither did it show that “severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed.” (*Ibid.*)

Accordingly, substantial evidence support’s the juvenile court’s finding that it was not in P.K.’s best interests to maintain her relationship with Mother rather than to allow

her the permanency and stability of an adoptive home, i.e., that the parental relationship exception does not apply. (*In re Beatrice M.*, *supra*, 29 Cal.App.4th at p. 1418.)

Inasmuch as substantial evidence supports the juvenile court's determination that the parental relationship exception does not apply and parental rights must be terminated, the court did not abuse its discretion in terminating Mother's parental rights and freeing P.K. for adoption. (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.)

The order is affirmed.

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JACKSON, J.

We concur:

WOODS, Acting P. J.

ZELON, J.